JUDICIAL RESTRAINT IN THE PURSUIT OF JUSTICE

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1. *The Dilemma of Judicial Restraint*

One of the biggest challenges facing the courts in public law adjudication is to determine the appropriate limits of their constitutional role. When a party to litigation argues that his or her fundamental rights are at stake, are there any circumstances under which the courts should refrain from protecting rights, or at least refrain from protecting them to an optimal degree? Whilst judges certainly possess legal training and expertise, they sometimes carry out their adjudicative function under conditions of uncertainty. They may not have an overview of the wider social, political or economic context in which their decisions take effect or, even if they do, they may be ill-placed to assess the implications of that broader context. If the legislature or executive can lay claim to superior knowledge or expertise in a particular case, should this warrant some humility, caution and deference on the part of the courts? Even aside from concerns about relative expertise, should their relative lack of democratic legitimacy urge judges to be restrained when reviewing the decisions of the elected branches for compliance with fundamental rights?

These are some of the most important and hotly contested questions in constitutional law and theory. Clearly, the degree of restraint exercised by the courts has a direct bearing on the extent to which the Legislature and Executive are effectively constrained by rights and the extent to which individual rights-claims are vindicated by the courts. But even beyond its practical importance for the outcomes

of individual cases, the question of judicial restraint forces us to grapple with larger theoretical questions concerning the constitutional separation of powers between the three branches of government. It prompts us to consider what courts should do and, crucially, what they should *not* do. Moreover, it challenges us to think deeply about the nature of judicial reasoning and whether it is appropriate for judges to take into account the consequences their decisions will have for the reputation of the courts. Finally, the question of the appropriateness of judicial restraint engages our deepest theoretical commitments about the nature and function of rights, in particular whether rights are or should be impervious to consequentialist considerations.

Judicial restraint presents the courts with a dilemma. How are judges to exercise a constitutionally appropriate degree of restraint, without ceding questions about the legality of decisions under scrutiny to the elected branches? Or put the other way: how can judges uphold human rights, without straying beyond the limits of their constitutional role? There is no easy solution to this dilemma, but in order to assess it, we need to get a clearer sense of the possible reasons and justifications for judicial restraint. Providing such an account is the main purpose of this article. In brief, my argument will be that the institutional limitations of the courts sometimes warrant judicial restraint. Whilst judges must sometimes be prepared to take a strong stand against the Executive or legislature, there are other situations where they should exercise their powers with caution and circumspection.

The article is divided into five parts. Part II contains an attempt to define judicial restraint. Part III examines the reasons justifying restraint. In Part IV, I tackle what I take to be the strongest argument against judicial restraint, namely, that

it may lead judges to refrain from protecting rights or at least refrain from protecting them to an optimal degree. Part V considers the way in which the concern to protect the courts' reputation can give rise to judicial restraint. Finally, Part VI explores the possibility that judges have reasons to be restrained not just in the outcome of their decisions, but also in the way they express, present and justify those decisions.

2. *Defining Judicial Restraint*

Judicial restraint is a pervasive feature of judicial decision-making. That is not to say that judges always exercise restraint. Rather, it is the point that in almost all cases, judges have to consider *whether* to be more or less restrained. In one form or another, judges face a choice between innovation and restraint, where innovation refers to judicial development of the law and judicial law-making, and restraint refers to a disposition to conserve existing law, refraining from pursuing the more innovative route. In this sense, judicial restraint concerns the extent to which the courts are willing to change and develop the law, as well as the court's sense of when and why it is appropriate to do so.[1]

In the academic commentary, judicial restraint is thought to encompass a wide range of doctrines, including deference to legislative and/or administrative decision-making, respect for precedent (and an aversion to overruling), a textualist or strict-constructionist approach to statutory interpretation, doctrines of standing and mootness, the floodgates argument and even the supposed requirement that judges

[1] Thus, 'judicial activism' in constitutional review is often defined as the willingness of the courts to challenge legislation on the ground that it violates rights, see e.g. Jeremy Waldron, 'Compared to what? Judicial activism and New Zealand's Parliament' (2005) N.Z.L.J. 441.

should avoid making moral or policy choices.[2] What unites this disparate array of doctrines is the belief that the courts ought to adopt a cautious and restrained approach to the choices presented to them in their adjudicative function.

In public law adjudication, the question of judicial restraint has a particular dynamic. The focus of this paper is on constitutional review, namely, the power of the courts to review or scrutinize a prior legislative decision (i.e. primary legislation) for compliance with human rights. In constitutional review*, judicial restraint governs the extent to which, or the intensity with which, the courts are willing to scrutinise a legislative decision and the justification advanced in support of that decision*. Being restrained indicates a less intense or probing level of the judicial scrutiny of legislation.[3] It may lead the courts to avoid adjudicating an issue entirely, as occurs when the courts rely on the doctrine of non-justiciability. Alternatively, the courts may adjudicate an issue, but do so in a less probing or intense way than they might otherwise have done.[4]

A number of clarifications need to be made before proceeding with the task of justifying judicial restraint in public law adjudication. First, judicial restraint is a matter of degree. A judge can be more or less restrained and can manifest that restraint in various ways. Judicial restraint is not the simplistic claim that judges should *never* interfere with legislative decisions or *never* review legislation in a probing and robust way, but rather that they should exercise a degree of restraint in appropriate circumstances.[5] Moreover, the ways in which the courts can exercise

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[2] For an overview, see John Daley, 'Defining Judicial Restraint', in Tom Campbell & Jeffrey Goldsworthy (eds.) *Judicial Power, Democracy and Legal Positivism* (Aldershot: Ashgate, 2000); see also Richard Posner, *The Federal Courts* (Cambridge, MA: HUP, 1996), 314-34.

[3] Thus, Guy Davidov characterises the operation of judicial deference in Canadian constitutional jurisprudence as light-touch or 'lenient' constitutional review, see 'The Paradox of Judicial Deference' (2002) 12 N.J.C.L. 133 at 133.

[4] See further Jeff King, 'Institutional Approaches to Judicial Restraint' (2008) 28 O.J.L.S. 1; Jeremy Kirk, 'Rights, Review and Reasons for Restraint' (2001) Sydney L.R. 19.

[5] See also Daley, supra note 2 at 279, 292.

restraint are many and varied. In some cases, the court may refrain from striking down a piece of legislation but nonetheless criticise the Government in robust, forthright terms. In others, they may strike down a legislative provision, but soften the blow by expressing themselves in a restrained and deferential manner. Judges can be restrained in terms of presentational style, whilst nonetheless being robust and 'activist' in terms of the legal outcome, and vice versa.[6]

Second, judicial restraint is a matter of *self*-restraint. It is for the courts to define the limits of their role in constitutional adjudication and to determine the constitutionally appropriate degree of restraint. So, the question of restraint is not about the legal powers which judges possess. Rather, it concerns the appropriateness of judges *not* exercising those powers, or at least being restrained in exercising them to the full.

Third, when courts decide that legislation infringes human rights, they set limits to the power of the legislature to enact whatever legislation it wishes.[7] It follows that the more willing the courts are to find legislation to be in breach of those rights, the greater the constraint on the elected branches. Therefore, judicial restraint in public law adjudication has an explicitly relational aspect vis-à-vis the legislature and Executive. For this reason, some commentators view judicial restraint as the requirement that judges should avoid contradicting or interfering with the decisions of other branches of government.[8] In this paper, I will keep the notion of 'interference with' legislative decisions deliberately vague. It is not confined to 'striking down'

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[6] Aileen McHarg pointed out to me that *Jackson v AG* [2006] 1 AC 262 is a good example of this phenomenon in the UK, because there, the House of Lords was restrained in terms of legal outcome, but made bold and controversial *obiter dicta* about the limits of parliamentary sovereignty. Another example is provided by *R(Abbasi) v Foreign Secretary and Home Secretary* [2003] UKHRR 76, where the British Court of Appeal rejected a claim that the UK Foreign Secretary's refusal to request the release of non-British detainees in Guantanamo Bay was unlawful, but nonetheless criticised the situation in Guantanamo in forthright terms at [64]-[66], see further Timothy Endicott, 'The Reason of the Law' (2003) 48 Amer.J.Juris. 83 at 101-104.

[7] Timothy Macklem, 'Entrenching Bills of Rights' (2006) 26 O.J.L.S. 107 at 109, 122-124.

[8] Posner, supra note 2 at 314.

legislation, but will refer more broadly to the judicial power to review legislation robustly for compliance with human rights, including the power to render that legislation compliant with those rights through mechanisms such as creative statutory interpretation. This keeps the argument for judicial restraint general enough to apply to jurisdictions where courts have a strike-down power, but also to those like the UK where the courts do not possess this power.[9]

Finally, when judges exercise restraint, this should not be equated with doing nothing or being passive.[10] As we know from our personal lives, the exercise of restraint can require strong will and determination. It can be every bit as active as intervention. Moreover, the need to justify restraint morally is no less pressing than the need to justify a more interventionist stance. Nor should one equate judicial restraint with political conservatism. Judges may have left-wing or progressive opinions on substantive issues (such as the redistribution of wealth or the need for state intervention), whilst simultaneously supporting a restrained judicial role.

3. Reasons for Judicial Restraint

Having provided a rough definition of judicial restraint, we must now turn to the justificatory task. The argument of this paper is that the justification for judicial restraint is rooted in the institutional limitations of the courts, together with a conception of the proper constitutional relationship between Parliament and the

[9] For a detailed analysis of the powers of the courts under the UK HRA, see Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act 1998* (Cambridge: CUP, 2009) at 281-293, though I argue at 281-293 that the judicial power to issue a declaration of incompatibility under s.4 HRA is not radically dissimilar to a strike-down power.

[10] For this reason, I will refrain from describing judicial restraint as a 'passive virtue', although some of my discussion has affinities with Alexander Bickel's influential discussion of judicial restraint in *The Least Dangerous Branch* (New Haven: Yale University Press, 1962).

courts. Let me explain how the institutional limitations of the courts bear on judicial reasoning.

When adjudicating legal questions, judicial reasoning is governed by two types of considerations. The first is an evaluation of the substantive legal merits of the legal question before the courts. In public law adjudication, such issues include whether legislation violates or respects rights or whether a decision by the Secretary of State is fair or just or reasonable. Evaluating these substantive legal questions is the primary task of the courts. It requires them to establish what the law requires in a particular case. We can refer to these considerations as *substantive reasons*. However, these are not the only considerations which bear on judicial reasoning. Also of relevance are what might be called *institutional reasons*. *Institutional reasons* engage a judge's view about the extent and limits of their institutional role vis-à-vis Parliament and the constitutional propriety of judicial intervention in a particular case.[11] This means that the courts should not only ask themselves the first-order question 'What do rights require in this case?', but also second-order questions related to the constitutional separation of powers such as 'is it appropriate for the courts to interfere with this legislative provision, given that it was enacted by a democratically elected legislature, after careful deliberation and widespread public consultation?' The first is a question about the content of rights. The second is a question about the institutional role of the courts in a constitutional democracy. It is the latter which potentially gives rise to the need for judicial restraint.[12]

One can identify at least four institutional reasons for judicial restraint. These are concerns about 1) judicial expertise, 2) the incrementalist nature of judicial law-

[11] Kavanagh, supra note 9 at 176ff.
[12] Note that although these two types of reasons are conceptually distinct, they may be difficult to separate in practice. For an argument that constitutional adjudication should depend, in part, on second-order judgments about institutional capacities, see Cass Sunstein, 'Second-Order Perfectionism' (2006) 75 Fordham.L.R. 2867.

making, 3) institutional legitimacy and 4) the reputation of the courts. Let us go through these one by one. The constraint of *limited expertise* reflects the epistemic limitations of the courts in evaluating certain issues. In situations where judges do not know (or are unsure about) how a particular issue should be resolved, or indeed are unsure what consequences will follow from a particular decision, such uncertainty may warrant a degree of judicial restraint.[13]

The second reason for restraint arises from the *incrementalist nature of judicial law-making*. Whilst legislators are relatively free to initiate legislation on any topic and can engage in radical, root and branch reform of a whole area of law, judges are much more constrained. In general, judicial law reform tends to be incremental and piecemeal, filling in gaps in existing legal frameworks, tackling one single legislative provision at a time, rather than reforming an entire statute or a whole area of law. This presents what Joseph Raz has called 'the dilemma of partial reform'.[14] It is a dilemma because the courts often have to choose between leaving a legislative provision intact (i.e. not interfering with it) or reforming it in a necessarily piecemeal or partial way. Judges are aware that partial reform can be fraught with danger, because it carries the risk of being counterproductive or failing to achieve the hoped-for aim.[15] This concern may give rise to judicial restraint.

The third reason for restraint reflects concerns about *relative institutional legitimacy*. Sometimes, the courts exercise restraint before interfering with primary legislation, out of a concern that a decision which changed the law would not be

[13] Kavanagh, supra note 9 at 183-190; see also Aileen Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in Grant Huscroft (ed.) *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: CUP, 2008), 194-200.
[14] Joseph Raz, *The Authority of Law* (Oxford: OUP, 1979).
[15] Cass Sunstein argues for a degree of judicial restraint in those cases where public outrage would render a judicial decision either futile, counterproductive or create more harm than good, Sunstein 'If People would be Outraged by their Rulings, Should Judges Care?' (2007) 60 Stanford.L.R. 155 at 170-172.

accepted by the public or indeed by the other branches of government due to worries about the courts' lack of democratic legitimacy and accountability. Whilst this has attracted some controversy in UK public law scholarship,[16] judicial dicta to the effect that they should respect decisions made by the elected legislature due to its superior democratic legitimacy, are not hard to come by.[17]

The fourth reason is grounded in *reputational concerns*. When handing down their decisions, judges have to do so in a way which preserves the reputation of the courts and inspires public confidence in them as an impartial, fair decision-maker. The courts must ensure, to the extent that they can, that their decisions are respected, both by the other political organs of government (Parliament and the Executive) as well as by the public at large, and should strive to avoid decisions which would bring the courts into disrepute. This reason for restraint will be discussed in more detail later in the paper.

4. The Interplay between Substantive and Institutional Reasons

Now that we have an admittedly rough idea of the reasons which may give rise to judicial restraint, we need more clarity on how the substantive and institutional reasons interrelate. *Substantive reasons* (i.e. those relating to the content of rights) are the primary reasons judges must take into account in constitutional review because they define the task of the courts in scrutinising legislative and administrative decisions. But this does not mean that they are the only reasons, or at that they are always decisive. Judges must evaluate the substantive rights-claim, whilst remaining

[16] See e.g. Jeffrey Jowell, 'Judicial Deference: Servility, Civility, or Institutional Capacity?' (2003) P.L. 592 at 596. For a response to Jowell's arguments, see Kavanagh, supra note 9 at 191-193.
[17] For examples of this phenomenon in the case-law under the UK HRA 1998, see Kavanagh, supra note 9 at 190-197.

sensitive to the institutional limitations of the judicial process and the constitutional propriety of judicial intervention in a particular context.[18] They must weigh those limitations against the relevant *substantive reasons*, in an effort to arrive at the best judicial decision, all things considered.

This balancing process is deeply embedded in the public law decision-making of the English courts. An example is provided by the well-known dictum of Bingham J (as he then was) in *Smith v Ministry of Defence*:[19] "the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable".[20] Encapsulated in this statement is the requirement that courts must weigh substantive and institutional concerns, in an effort to arrive at the best possible outcome in the case before them. The severity of the rights-violation weighs against reasons for restraint. This means that institutional questions about the extent to which judges should defer to the primary decision-maker depend in part on what is at stake on the substantive side of the scales. Institutional considerations are more likely to win out when the stakes are low. But when there is a clear and substantial rights-violation, this may outweigh judicial concerns about expertise or uncertainty or political consequences. In such situations, the balance may be tipped in favour of judicial intervention rather than restraint.

Some academic commentators fiercely oppose the idea that judges can or should rely on *institutional reasons* when reviewing legislation for compliance with human rights.[21] T.R.S. Allan believes that judicial restraint involves an 'abdication of

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[18] For an exploration of how this balance between *substantive* and *institutional reasons* is evident in adjudication under the UK HRA 1998, in particular in the judicial choice between interpreting primary legislation compatibly with Convention rights under s.3(1) HRA 1998 or issuing a 'declaration of incompatibility' under s.4 HRA, see further Kavanagh, supra note 9 at 133-137.
[19] *R v Minister of Defence, ex parte Smith* [1996] Q.B. 517.
[20] *ibid.* at 554. For further analysis of *Smith,* see Kavanagh, supra note 9 at 248-251.
[21] See further T.R.S. Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' (2006) 65 C.L.J. 671 at 689, 675. For a reply to Allan's views on judicial deference, see Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 L.Q.R. (forthcoming).

judicial responsibility' [22] to protect rights. Allan's powerful critique brings to the fore a worrying and seemingly unpalatable consequence of judicial restraint, namely, that if judges exercise restraint in human rights adjudication, a worthy rights-claim may receive no redress. Justice for the individual will not be done - or at least not done to an optimal degree. One Canadian scholar put this point succinctly: since judicial restraint leads to "an easing of the constraints on the state, it undercuts constitutional rights".[23] How can this be justified? Moreover, rights are sometimes perceived to be impervious to consequentialist considerations. In this vein, Ronald Dworkin famously argued that rights are 'trumps' in the sense that they should not be vulnerable to routine changes in social utility.[24] Of course, one does not have to be a card-carrying Dworkinian to have grave reservations about the prospect of judges failing to vindicate rights in order to shore up their own reputation or avoid adverse public reaction to their decisions. Surely such a crude trade-off between rights and prudential concerns is illegitimate, since the very purpose of rights is to stand as a bulwark against expedient policies?[25]

This is a formidable challenge indeed, based as it is on common assumptions about the nature and function of rights and the role of the courts in upholding them. However, I believe that it is nonetheless misguided. Let me begin to meet the challenge by making the following observation about doctrines of restraint in general. Part of the apparent problem with judicial restraint arises from the fact that doctrines of restraint seem to have a paradoxical air about them.[26] Trevor Allan is absolutely

[22] Allan, ibid at 675.
[23] Davidov, supra note 3 at 135.
[24] Dworkin, 'Rights as Trumps', in Jeremy Waldron (ed) *Theories of Rights* (Oxford: OUP, 1984).
[25] Though this position is not without its philosophical detractors, see eg Joseph Raz, 'Rights and Individual Well-Being' (1992) 5 Ratio Juris 127.
[26] Raz, *The Morality of Freedom* (Oxford, OUP: 1986) at 110-111; Raz, 'Disagreement in Politics' (1998) 43 Amer.J.Juris 25 at 47-48; David Enoch, 'On Estlund's *Democratic Authority*' (2009) Jerusalem.Phil.Q. 35 at 45.

right that if judges exercise restraint, it may lead them to refrain from correcting an injustice in primary legislation. It suggests that judges should *not* act on reasons of justice, despite the fact that the main rationale of giving judges powers of constitutional review (and indeed insulating them from direct public pressure) is precisely to ensure that legislation complies with the requirements of justice.[27] But there is nothing paradoxical about doctrines of restraint: sometimes we have reasons not to act on what we acknowledge are good reasons - especially when we operate under institutional constraints.[28] Paradoxical though it may appear, judges must sometimes refrain from putting right an injustice contained in primary legislation, if to do so would cause more harm than good. Rights are not the only value which judges must take into account in public law adjudication. They have to be balanced against institutional reasons pertaining to the limits of the judicial role, the propriety of judicial intervention in certain contexts and the degree to which an innovative judicial decision will be accepted either by politicians or the populace at large.

Second, though institutional reasons may require a court to refrain from putting right an injustice contained in primary legislation, it must be remembered that *institutional reasons* are themselves reasons of justice.[29] The appropriate division of labour between the three branches of government in a constitutional democracy is a moral question, and when deciding whether to be more or less restrained, judges are required to make moral judgments about how the powers of government should be distributed, exercised and constrained.[30] Therefore, what justice requires in an

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[27] Timothy Endicott, 'Habeas Corpus and Guantanamo Bay: A View from Abroad', (2007) *University of Oxford Faculty of Law Legal Studies Research Papers Series* at 10.
[28] For a defence of exclusionary reasons, see e.g. Raz, supra note 14, part 1. For an exploration of the virtue of restraint in democratic politics, see Steven Wall, 'Democracy and Restraint' (2007) 26 Law & Phil 307-342.
[29] This gives reasons of restraint an ironic quality, see Endicott, supra note 27 at 10.
[30] See further Kavanagh, supra note 9 at 200-201; Ronald Dworkin, 'Darwin's New Bulldog' (1998) 111 Harv.L.R. 1718, 1730n; Waldron, 'Judges as moral reasoners' (2009) 7 I-CON 2 at 7.

individual case is the judicial decision which is supported by a proper balance between the relevant substantive and institutional reasons. Sometimes justice will require judicial intervention; at others, it will require more caution and self-restraint.

Most likely, this response will fail to convince those who oppose the idea of judicial self-restraint. Whilst they may be prepared to concede that the question about institutional allocation of power may be moral or normative in nature, they will bridle at the suggestion that pragmatic or consequentialist considerations can be assimilated into the 'moral' domain. What is objectionable about my argument, they will say, is that it condones the idea of judges choosing expediency over justice at least in some cases. Surely it is unacceptable for judges to refrain from making the right moral decision just because it might reflect badly on the judiciary or would be considered unpopular or politically controversial? The latter are consequentialist considerations which should have no place in judicial decision-making.

This apparently devastating critique rests on some dubious distinctions and assumptions. Clearly, the question about whether judges should eschew consequentialist reasoning, or indeed the broader philosophical question about whether practical reasoning can in fact be divided into moral and consequentialist concerns in the way assumed by the critique, are large and complex issues which cannot be fully resolved within the confines of this paper.[31] Perhaps it will suffice to point to some examples from the case law where the legitimacy of judicial reliance on consequentialist considerations seems entirely in order. When judges decide medical negligence cases, we think that it is entirely legitimate for them to consider (as they

[31] See further Peter Cane**, '**Consequences in Judicial Reasoning' in J. Horder ed., *Oxford Essays in Jurisprudence, Fourth Series* (Oxford, 2000); W. Sadurski 'Rights and Moral reasoning: an unstated assumption – A comment on Jeremy Waldron's "Judges as Moral Reasoners"' (2009) 7 I-CON 25 at 30-31. On the broader question, see J. Raz, *Engaging Reason* (Oxford: OUP, 1999), 303.

often do) the impact their decision will have on medical practice.[32] Similarly, if judges have to decide whether a member of the police force owes a duty of care to members of the public, we accept that judges must consider the consequences this may have on the conduct of police business and their ability to suppress crime, as well as the consequences for legal development and the role of the courts more generally.[33]

This is the familiar floodgates argument, familiar because it is such a common and accepted feature of judicial decision-making. If judges make a decision which upholds a rights-claim to an optimal degree, but, say, completely undermines the ability of the police to suppress crime, then this is something we should worry about. Only the most fervent rights-enthusiast could celebrate such a decision. Similarly, if a court hands down a decision which valiantly upholds, say, the right of same-sex couples to marry, but it transpires that society is simply not ready to accept this legal reform, or at least not prepared to accept it as a dictate *from the courts*, then these are powerful reasons in favour of a degree of judicial restraint. If a judicial decision achieves nothing more than a backlash against gay couples, thereby increasing intolerance towards them and sapping the political will to implement the legal reform (or indeed galvanizing it to reject the reform altogether), then the decision may be at best futile, and at worst positively harmful to the interests sought to be protected by the rights-claim in the first place.[34] Judicial decisions take effect in the world in which we live, and justice is not served if judges hand down decisions which are ineffective, counterproductive or deleterious to the interests served by rights.

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[32] Lord Woolf, 'Droit Public-English Style' (1995) P.L. 57.
[33] See *e.g. Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53, *per* Lord Templeman at 65.
[34] See also Sunstein, supra note 21 at 174; David Cole 'The Same-Sex Future' (2009) 56 N.Y.R.B 12-16. Nicholas Bamforth points out that even when courts uphold same-sex partnership rights, they sometimes exercise restraint by allowing the legislature to take some time before implementing the relevant legal reform, see 'Same-sex partnerships: some comparative constitutional lessons' (2007) E.H.R.L.R. 47 at 57.

These examples serve to highlight another important point, namely, that judicial sensitivity to the consequences of their decisions is not an exceptional or aberrant aspect of their decision-making. On the contrary, consideration of alleged social harms and policy goals is part of the 'traditional judicial toolkit'.[35] Moreover, when we examine public law adjudication, we often find that it is difficult to separate the consequentialist considerations from what we might identify as straightforward moral concerns.[36] The difficulty of disentangling these considerations may well go to support the views of those who dispute the common division in practical thought between moral and self-interested reasons.[37] This accords with my own view, which is that in order to arrive at a just decision, judges must take the practical, political and consequentialist considerations into account, alongside substantive questions about the requirements of rights. To put it another way: a judge cannot come to an acceptable conclusion about what justice requires in an individual case without evaluating the relative weight of the *substantive* and *institutional reasons* – not least because what justice or morality requires in a particular decision will depend (in part) on the consequences that decision may have. If there are good reasons for judges not to interfere with a legislative or executive decision - good enough to outweigh the *substantive reasons* based on the requirements of rights - then a decision not to interfere *is* the best or most just judicial decision.

Fervent supporters of constitutional review who look to the courts as the bulwark of rights-protection, sometimes overlook this point. Their instruction to judges seems to be 'do the right thing', when the right thing is conceived *only* in terms of upholding fundamental rights in the case before them. But courts do not act in their

[35] Justice Antonin Scalia, 'Judicial Deference to Administrative Interpretations of the Law' (1989) Duke.L.J. 511 at 515.
[36] See further Kavanagh, supra note 9 at 200-201.
[37] Raz, supra note 31 at 303; see also Sadurski, supra note 31 at 30-31.

own name. They act as organs of the state with particular institutional responsibilities. On my analysis, the appropriate instruction to the courts is 'do the right thing to the extent that you can do so responsibly within the institutional constraints under which you operate'. The 'do the right thing' component of the instruction enjoins the courts to be responsive to the *substantive reasons* pertaining to the content of rights, and to strive to protect the rule of law by holding the elected branches of government firmly to account. But the qualification that they should do so 'responsibly within the institutional constraints which define their role' is the part which warrants judicial restraint. This qualification opens up some logical space between what a judge might decide in his or her personal capacity, and what might be constitutionally appropriate to decide *qua* judge. It also highlights the fact that reasons for judicial restraint tend to be agent-bound,[38] i.e. they may give *the courts* reasons not to interfere with primary legislation, without being reasons for other agents (such as Parliament or indeed private citizens) to do so. But the judicial duty to be sensitive to their institutional role and limitations and to consider seriously any adverse consequences of their decisions, is also a moral responsibility.

5. *Restraint and Reputation*

I want now to discuss the reasons for restraint which collect around the judicial desire to protect and enhance the reputation of the courts. Reputational concerns often lead the courts to adopt a restrained rather than interventionist approach to their decision-making. Examples of this phenomenon are provided by the British judiciary's self-portrayal of their role under the HRA 1998 in the early days of

[38] Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Larry Alexander (ed) *Constitutionalism: Philosophical Foundations* (Cambridge: CUP, 1998) at 188.

its enactment. In this period, Lord Woolf noted extra-judicially that, given the extent of the change brought about by the HRA, a "degree of conservatism" was in order: "the objective should be to convince the legislature and the executive that the supervision of the courts is wholly constructive."[39] Similarly, Lord Bingham opined (again extra-judicially) that when carrying out their new adjudicative role under the HRA, judges should be appropriately respectful to the elected branches: "to do so would certainly help to allay the fears of those who see [the HRA] as an objectionable judicial usurpation of democratic authority". [40] This concern is echoed in Lord Justice Keene's comment that a potentially "hostile public reaction to the courts overstepping their proper constitutional role" would provide the courts with a reason for judicial restraint.[41] In every jurisdiction, it is easy to find examples where courts demonstrate that they are not insensitive to the political responses to their decisions and are concerned to meet the accusation of judicial adverturism.[42] Such factors clearly influence judicial decisions. The question is whether it is legitimate for them to do so.

In my view, it would be irresponsible for judges to decide cases whilst remaining oblivious to the possible political and social response to their decisions, including whether a decision would bring the judiciary into disrepute, whether a particular judicial decision would produce a backlash in society, whether society is ready for the legal change, whether it might be counterproductive to introduce it at this particular time or whether the legislature or government would then move to curtail the powers of the courts as a result. Although judges have an obligation to do

[39] http://www.judiciary.gov.uk/publications_media/speeches/pre_2004/lcj100403.htm
[40] Lord Bingham 'Incorporation of the ECHR: The Opportunity and the Challenge' (1998) 2 Jersey L. R. 257 at 269-70.
[41] Justice Keene 'Principles of Deference under the Human Rights Act' in Fenwick, Phillipson & Masterman (eds) *Judicial Reasoning under the UK Human Rights Act* (Cambridge: CUP, 2007), 206 at 210.
[42] For some American and Canadian examples of this phenomenon, see Mark Tushnet 'New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries' (2003) 38 Wake Forest L.R. 813 at 829-30.

justice in the individual case, that is not their only obligation. They also need to ensure that the courts are respected both by the other branches of government and by the public at large. Just as they are concerned to do justice in the individual case, they must also be concerned with their more long-term ability to fulfil this role.

This is not to say that reputational reasons are always of overriding importance. There are cases where the courts decide (rightly) to face down public criticism, or move quicker than the pace of society and do justice in the instant case, despite (legitimate) worries about the feasibility of implementation.[43] It may be that the injustice is so heinous that the courts feel they have no other option, especially if there is no sign of reform coming from any other branch of government.[44] But even when being interventionist and 'activist', judges need to appreciate the political context in which they operate. They are the weakest branch of government and are dependent on the other branches of government to respect and implement their decisions. Given this dependence, the continued power of the courts to make law and do justice in individual cases depends, in part, on not alienating the legislature and executive and securing respect for their judgments in society as a whole. This is a reason in favour of some restraint in judicial decision-making. It means that *institutional reasons* can sometimes defeat *substantive reasons* in public law adjudication.[45]

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[43] In the US context *Brown v. Board of Education of Topeka* 347 U.S. 483 (1954) is the classic example. However, the difficulty in implementing *Brown*, which lasted for decades, shows that the prudential and moral reasons in favour of postponing such a legal change can have tremendous force, see Andrei Marmor *Interpretation and Legal Theory* (Oxford: Hart Publishing, 2nd ed, 2005), 162.
[44] Beverly McLachlin 'The Supreme Court and the Public Interest' (2001) 64 Sask.L.R. 309 at 319.
[45] See also Raz, supra note 38 at 187. David Dyzenhaus put to me the point that it is a mistake for judges to rely on reputational or other prudential considerations, because there are some cases (he instanced *Hamdi v Rumsfeld* (2004) 542 U.S. 507 as an example) where judges decide to be deferential in order not to rile the executive, only to discover that their strategy of restraint is counterproductive, or creates difficulty for future jurisprudence by shackling the courts with a bad precedent. In response, I would simply say that just as with judicial 'activism', judicial restraint also carries the risk that it may backfire or have bad legal or political consequences. However, this does not undermine the general

6. Courtesy, Confrontation and Candour

Earlier in the article, I mentioned that even if judges ultimately oppose the legislature and 'strike down' a legislative provision, they may nonetheless present their decisions in a restrained and deferential manner. In this section, I want to consider whether it is legitimate for judges to exercise restraint in how they present, express or justify their decisions. Many people vehemently oppose this suggestion. They say that judges should be as open and candid as possible about all the factors which influence their decisions. Judicial candour is prized not only because it is thought to enhance the transparency of judicial decision-making, but also because it can be a way of constraining judicial power, increasing the likelihood that judges will rely on legitimate reasons.[46]

Clearly, there is a lot to be said for these claims. Openness, transparency and public accountability is to be expected from all public institutions, including the courts. We do not want judicial decisions to be shrouded in mystery or subterfuge. However, judges sometimes have good reasons to be less than completely candid about some of the grounds of their decisions. Complete honesty, I will argue, is not always the best judicial policy. Not only does judicial restraint require judges to exercise some restraint in their decision-making, it also requires them to be restrained in the way in which they express or present their justifications for that decision.

In order to support this point, let us prescind from the discussion of judicial reasoning and think more generally of the value of restraint in, say, friendships.

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argument in favour of judicial restraint – it merely shows that judicial restraint must be exercised with caution and sensitivity to its (potentially negative) future consequences.

[46] D. Shapiro, 'In Defence of Judicial Candour', (1987) 100 Harv.L.R. 731 at 737 (1987).

Sometimes, friends do things which strike us as morally wrong. In such situations, we may feel motivated to be candid and upfront about our views on their behaviour. However, absolute candour across the board is not always the right response. Indeed, it can sometimes be futile or counterproductive. Not only might it fail to prevent the friend from continuing to carry out the immoral act, it may well strengthen their resolve to pursue it, whilst simultaneously upsetting them, thus potentially undermining the friendship. We expect our friends to support us, even in situations where we are not doing the right thing. Therefore, the value of sustaining the friendship, supporting and respecting our friend, will sometimes warrant a degree of restraint and forbearance, rather than absolute candour.

There are less extreme examples of the value of restraint in friendship. Many friends disagree about politics, music, art and much more. Sometimes, open and frank disagreements about such matters will not damage a friendship in any way. But again, this is not true across the board. There are some situations where friends avoid discussion of politics if they know that it will generate acrimony and discordance. Sometimes, it is appropriate to underplay the extent of disagreement, for fear of gratuitously insulting a friend. These are situations where restraint is justified out of respect for the friend and a desire to sustain the friendship.

These examples highlight some features of the virtue of restraint which can be applied to the judicial context. First, restraint is not an all-or-nothing value which applies across the board. Rather, one must judge whether restraint is appropriate in a particular context, and if so, how much. Secondly, it is grounded in the value of respect. Out of respect for others, we are sometimes required to be polite and courteous about our disagreements with them. Absolute candour, on the other hand,

may cause offence, insult and resentment. Not only should we respect our friends, we must create the *appearance* of respect for them.[47]

Something analogous is true of the relationship between the courts and the elected branches of government. Judicial restraint is sometimes warranted out of respect for the superior competence, expertise or democratic legitimacy possessed by the elected branches of government.[48] Of course, respect does not mean that the courts are bound to agree with everything the legislature or executive does. Disagreement and respect not mutually exclusive options. However, when disagreeing with Parliament, the courts must express their disagreement in a respectful, restrained and courteous way. Part of their task *qua* judges is to convince the legislature and executive that the courts are constructive partners in the joint enterprise of sustaining just government in a constitutional democracy.[49] The requirement of comity with the elected branches means that the courts should not deliver decisions which belittle or ridicule Parliament or in a way which seeks to de-legitimise their legislative or policy choices. Thus, even if judges believe that the government of the day is thoroughly misguided in pursuing a particular legislative programme and has merely pandered to the demands of the tabloid press in a crude attempt to win votes before an election, absolute candour about this fact may undermine the respect judges must show for the elected branches of government. Such candour may alienate the legislature and Executive on whom the courts depend for the implementation of their decisions, cause resentment and backlash from politicians and, overall, be utterly counterproductive. One of the institutional

[47] For the moral significance of politeness or courtesy as a way of *signalling* respect, see Calhoun 'The Virtue of Civility' (2000) 29 Phil.&Pub.Affairs 251 at 255; Sarah Buss 'Appearing Respectful: The Moral Significance of Manners' (1999) 109 Ethics 795 at 801.
[48] See further Kavanagh, supra note 13 at 184.
[49] Endicott, supra n 33 at 1; see also David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: CUP, 2006) where he argues that the rule of law is best understood as a 'shared project' between all organs of government.

constraints under which judges operate is that they have to try to uphold rights whilst simultaneously sustaining a respectful, constructive and mutually supportive relationship with the elected branches of government. In some cases, this warrants restraint rather than candid criticism.

It may be objected here that the analogy between friends on the one hand, and Parliament and the courts on the other, is misleading because Parliament and the courts are nothing like friends.[50] Some believe that the relationship between Parliament and the courts is more like that of master and servant. For others, the relationship is more closely analogous to enemies than friends. On the latter understanding, the role of the court is not to support Parliament, but to stand up to it, to oppose its decisions if they are unjust, to hold it to account, to force it to uphold rights when it may not wish to do so.

In responding to this objection, I shall make the following brief points. The main purpose of the analogy with friendship was simply to highlight the intuitive plausibility of the suggestion that complete, unrestrained candour is not always a virtue. It is a platitude that meaningful friendship requires honesty between the parties to the friendship. Yet we know that this platitude does not capture the full complexity of responses appropriate to friendship. Sometimes, restraint is more appropriate. I used friendship as a heuristic device to show that although belief in the importance of judicial candour has become something of a platitude, it does not undercut the fact that there are nonetheless good reasons for judicial restraint.

There is another aspect of the analogy with friendship which, in my view, lends it plausibility as a way of illuminating the inter-institutional dimension of judicial reasoning. This is that the sustenance of a friendship is a joint endeavour

[50] This point was put to me by Panu Minkkinen.

between friends which ought to last over time. Being a friend means that, on occasion, one has to bite one's tongue in the short-term, in order not to do long-term damage to the friendship. Similarly, in the institutional relationship between the courts and the legislature, the courts must have an eye to the longer-term picture and the consequences of their actions, in order to earn respect and support from the legislature in the longer term.[51]

But there is no denying that the analogy with friendship cannot be pushed too far. I am not trying to suggest that the relationship between the courts and the legislature is always a cosy one, with both institutions always on the same side on every issue. On the contrary, both institutions have their strengths and their weaknesses, and as partners in the joint endeavour of ensuring just constitutional government, the courts may be required to stand up to the legislature, oppose a legislative decision and strike it down if needs be. Sometimes the legislature and the courts will be pulling in different directions, and the legislature will feel constrained by judicial decisions. As responsible partners in the joint endeavour, the courts must be prepared (in appropriate contexts) to stand their ground.

7. Conclusion

The aim of this article was to show that judicial restraint is sometimes appropriate when reviewing primary legislation for compliance for human rights. However, it would be wrong to think that in doing so, I wished to advocate a timid or obsequious judiciary. Sometimes there are no good reasons for restraint, or even if such reasons exist, they are outweighed by the strength of the rights-claim. Nothing

[51] For further discussion of the idea of law as a 'joint endeavour' between the different institutions of government, see D. Kyritsis, 'What is Good about Legal Conventionalism?' (2008) 14 Legal Theory 135.

in this article was meant to detract from the importance of the judicial duty to stand up for rights in times of crisis. But we also need to remember that the courts suffer from institutional and political limitations which sometimes prevent them from protecting rights in every case.

At the outset of the article, I suggested that judicial restraint poses a dilemma for the courts. How should judges ensure that legislation complies with human rights, without reneging on their responsibility to remain within the limits of their constitutional role? There is no easy or formulaic answer to this dilemma. The modest argument advanced here is that judges must evaluate the relevant substantive and institutional reasons, balancing the requirements of rights against the institutional considerations pertinent to the individual case.